SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 28

CLOVERLEAF BUTTER COMPANY, A CORPORATION,
Petitioner,

vs.

HAYGOOD PATTERSON AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH, AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HORACE C. WILKINSON,
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VICTOR H. SMITH,
Counsel for Petitioner.

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MAY IT PLEASE THE COURT:

The brief of the respondents presents a striking inconsistency. They say this case involves a matter of local concern only. Yet their argument demonstrates beyond question that the case involves a matter of national impor-

tance; particularly is this true at this time when we are facing a situation when every ounce of butter fat that can be converted into an edible product may be desperately needed.

However subtle the argument, the respondent's position is this: they claim the State has the power to prohibit the renovation of butter. They do not say this in so many words, but that is what the argument of learned counsel for the respondents means. It is obliged to mean that. If the State can prohibit the renovation of sub-standard butter, that is the end of the renovated butter business. As a practical proposition the prohibition is as effective as if the State should say: it shall be unlawful for any person to engage in the renovation of butter. Standard butter needs no renovation. The only raw material that can be used in the manufacture of renovated butter is raw country butter. It requires no scientist to understand that all raw country butter is sub-standard in a greater or less degree for one or more of many reasons. Some of it may have too much or too little moisture in it; some of it may have undesirable foreign substance in it; some of it may be too old for human consumption until it is reworked. There is probably not a pound of raw country butter that is not technically "adulterated"—in a greater or lesser degree—according to the statutory definition of "adulteration," yet millions of Americans have reached a ripe old age on a diet that is composed of large quantities of this self-same "adulterated" butter.

That the State may prohibit the possession, sale or delivery of sub-standard butter *as food* is conceded. That it may prohibit its conversion into a useful, desirable food product is quite another question. The public health is not protected by prohibiting the conversion of unfit raw material into a finished product of unquestioned fitness.

A.

Renovation is to butter as pasteurization is to milk. The power of Congress to regulate raw material in interstate commerce from which food for sale and shipment in interstate commerce is manufactured, is as broad and comprehensive as its power to regulate any other article of commerce. The power of Congress is to regulate interstate commerce—all of it—including sub-standard raw butter in interstate commerce.

For more than half a century the renovation of butter has been regarded by the State and Nation as a useful and legitimate business. It is the business of a butter renovator to take a sub-standard product—a product which may be unfit for human consumption in its then condition and to make it fit for human consumption. The renovator of butter renders that which may be unfit to be consumed in its then condition, fit for consumption by subjecting it to a process that renders it pure, wholesome and unobjectionable from a health standpoint, just as the pasteurization plant renders dangerous milk, unfit for human consumption in its then condition, fit for consumption by subjecting it to the process of pasteurization.

The State of Alabama has not prohibited the pasteurization of milk. It has encouraged it. The State of Alabama has not prohibited the renovation of butter. It has encouraged it. The United States has not prohibited the renovation of butter. It has encouraged it. Only the respondents have attempted to advance so far beyond the experience of mankind as to say that butter unfit for human consumption—in its then condition shall not be converted into wholesome food, but must be seized and destroyed.

B.

The claim that Congress has not occupied the field by the Renovated Butter Act.

As we read the opinion of the Circuit Court of Appeals, even that court did not accept that proposition as sound. That court seems to have conceded that Congress has occupied the field (by legislation and the most comprehensive regulations) but the court seems to have attached no importance to Congressional occupation of the field, because,

> "Nothing in the act, the regulations, or the practices under the act, purport to *expressly grant* to plaintiff immunity from state seizure of food products which in the opinion of state officers, are filthy or deleterious in violation of Alabama laws."
>
> 116 Fed. (2d) at page 230.

Briefly stated, the Court of Appeals seems to hold that Congress is in the field, but others may also enter until Congress expressly tells them to stay out. We maintain that complete occupation of the field by Congress excludes all others, without Congress saying anything else about it.

If Congress has not fully and completely occupied the field, it would have been in order for our able friends on the other side, or for the Court of Appeals, to have pointed out the portion of the field unoccupied by Congress as this Court has done in many instances.

1.

The claim that the Renovated Butter Act is not intended as a regulation of commerce.

This claim ignores the title of the Act, a part of which is: "and *to regulate the manufacture* and sale of certain dairy products." It ignores Section 2325 I. R. C. which provides:

> "The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials

going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with words 'Renovated Butter' or 'Process Butter' and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. *The Secretary of Agriculture shall make all needful regulations* for carrying this section and sections 2326 (c) and 2327 (b) into effect *and shall cause to be ascertained* and reported from time to time *the* quantity and *quality of* process or renovated butter manufactured, *and the character and the condition of the material from which it is made.* And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in Court of exportation or shipment he shall have power to confiscate the same." (Emphasis supplied.)

Is a *rigid sanitary inspection* a revenue measure? This claim ignores Regulation 4, Section 1, Regulation 7, Sections 1 and 2 which provide:

"Regulation 4—Sanitation and Sanitary Inspection of Products of and Material From Which Process or Renovated Butter is Manufactured:

"Section 1. 'Rigid' sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured."

* * * * * * *

"Regulation 7—Process or Renovated Butter Intended for or in the Course of Interstate Commerce or for Export

"Section 1. *To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health* or unwholesome in the finished product, a sample of such butter shall be taken.

"Section 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one *churning*, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter." (Emphasis supplied.)

It ignores *U. S.* v. *Bohl*, 125 Fed. 625.
It ignores the bill's Legislative history.

Legislative History.

The Legislative History of the renovated butter act as shown by the records of the 57th Congress at which it was adopted clearly evidences the knowledge of Congress of conditions then existing in that industry and its purpose to provide effective regulation and inspection of the raw materials used and the sanitary conditions under which process or renovated butter is manufactured.

This act had its genesis in legislation relating to oleomargarine. The first Federal action along this line was the Act of August 2, 1886, chapter 840, 24th Statutes 209, which did not touch the subject of process or renovated butter. In the 56th Congress a bill was introduced in the house known as the Grout Bill which undertook to further regulate the oleomargarine industry, but did not mention process or renovated butter. Lengthy hearings were held by the

House Committee on agriculture and that bill passed the House but not the Senate.

The same bill was re-introduced in the House in the succeeding 57th Congress (House Bill 9206) and again referred to its Committee on Agriculture where, after further hearings, a majority reported favorably and a substitute was offered by a minority. Neither report made any references to process or renovated butter.

At that time many process butter factories were being operated throughout the country. Statement was made on the hearing before the Senate Committee February 18, 1902, that there were about 485 renovated butter factories in the country and only about 27 oleomargarine factories—"Senate Hearing on House Bill 9206, Senate Committee on Agriculture", page 24. Both before the House and the Senate Committees in the debates in both Houses frequent references were made to the deplorable conditions of the raw material used to manufacture renovated butter, the manner in which it was gathered, and the unsanitary methods employed in the plants themselves. It was charged that the necessity for effective regulation and inspection of the process or renovated butter was much greater than that of oleomargarine. The opponents of the oleomargarine bill challenged those favoring it to sponsor legislation which would remedy the evils in the process or renovated butter business. (See Congressional Record, 57th Congress, House Bill 9206, pages 1301, 1303, 1352, 1353, 1595, 1624, 1625, 1630, 1658; speech by Mr. Grosvener, appendix pages 46-47; 177-178). While the matter was under discussion in the House, Mr. Allen of Kentucky introduced an amendment to the oleomargarine bill (Congressional Record, page 1352) which provided that the Secretary of Agriculture was authorized and required to cause a rigid sanitary inspection to be made from time to time and at such times as he may deem necessary of all factories and store houses where

butter is renovated; and all butter renovated at such plants shall be carefully inspected in the same manner and to the same extent and purpose as meat products were then inspected, and that the quantity and the quality of butter renovated should be reported monthly; and requiring such butter to be branded or labeled as renovated butter in such manner as the Secretary of Agriculture might prescribe and authorizing the Secretary of Agriculture to make all necessary sanitary and other rules and regulations for carrying that section into effect.

The Allen Amendment did not contain the provisions that the Secretary of Agriculture, "shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome material is found to be used in products intended to be used in exportation or shipment into other states, he shall have power to confiscate the same", as is provided by the law which was finally adopted.

The bill with the Allen Amendment was adopted in the House February 12, 1902 (Congressional Record, page 1658).

In the Senate the bill was referred to its Committee on Agriculture which also conducted hearings. There the opponents again made frequent charges concerning the raw material and conditions pertaining to the process or renovated butter industry and its need for regulation. (Senate Hearings on House Bill 9206, Senate Committee on Agriculture, pages 4, 5, 6, 7, 8, 9, 49, 50, 51, 52, 53). However, the majority report struck the Allen Amendment and reported the bill as it was first introduced in the House. On the floor of the Senate the charges concerning the renovated butter industry were more frequent and fuller. The com-

mittee was criticized for recommending elimination of the Allen Amendment.

Many Senators objected to the passage of the bill without provisions regulating process or renovated butter. Senator Culbertson offered an amendment to the entire bill (Congressional Record, pages 3278-79). In the discussion Senator Lodge stated that he favored the oleomargarine bill but further said: "Whatever may be thought of oleomargarine—I believe in itself it is generally considered an innocuous product. There is no doubt that process butter, renovated butter, is as bad an article as can possibly be devised; and I do not think this bill ought to pass without a suitable provision in regard to renovated butter." It was then stated by Senator Quarrels that an amendment had been offered which provided for that (Record, page 3282).

Senator Proctor then stated, in substance, that the Committee reported in favor of striking out the Allen Amendment for the reason that it was very imperfect and would not accomplish the purpose aimed at and that Senator Harris had offered an amendment fully covering renovated or process butter and adulterated butter (Congressional Record, page 3282).

The Harris Amendment is set out on page 3316 of the Congressional Record. This amendment, though amended in some respects, forms the basis of the present law relating to process or renovated butter. Concerning his amendment, *Senator Harris said:* "* * * *There has been a great deal of complaint made and I think with justice, that the health of the consumer is injured by what is called process or renovated butter. I think the amendment I have offered practically protects in the most efficient way, the interest of the consumer in that direction.*" (Congressional Record, page 3316.) (Emphasis supplied.)

He further referred to the conditions of material and methods of manufacture of oleomargarine prior to the Act of 1886 which he said were checked by that Act and that the bill had been the salvation of that industry and stated:

> "I believe that the regulation which is imposed upon renovated or process butter by the amendment which I have offered will be of equal value to the great dairy interest of this country. They are in danger, I think, of being rendered obnoxious on account of the improper process used by the manufacturers of renovated or process or adulterated butter. *Because it is to protect the purity of the food products of this country I think that this legislation justifiable and proper*" (Congressional Record, page 3317). (Emphasis supplied.)

During the discussion, *Senator Proctor who had charge of the bill stated that the Harris Amendment so far as butter is concerned, is a Pure Food Bill.* (Congressional Record, page 3459).

The Harris Amendment in its final form as adopted by the Senate is set out on page 3607 of the Congressional Record. The bill was passed by the Senate April 3, 1902. Statements concerning the character of the raw material and other conditions in the process or renovated butter industry and the necessity for congressional action for the protection of the public by regulation and inspection as shown by the Congressional Record, were made by: Senator Money, pages 3241-3242; Senator Proctor, page 3242; Senator Stewart, pages 3271-3272; Senator Dolliver, page 3277; Senator Lodge, page 3282; Senator Quarrels, page 3282; Senator Proctor, page 3282; Senator Stewart, pages 3282-3283; Senator Harris, pages 3316-3317; Senators Hatfield, Harris and Money, page 3221; Senator Simmons, page 3454, and Senator Proctor, page 3459.

In explaining changes made by the Senate to the House sitting as a Committee as a whole, Mr. Henry among other

things stated (Congressional Record, page 4586) that the Senate amendment struck out the imperfect House provision for regulating the manufacture of process or renovated butter and substituted a sure and comprehensive law for identification and taxation of the product under supervision of the Treasury Department, and for inspection, sanitary control and regulation under the Department of Agriculture.

In view of the fact that Mr. Henry had at first objected to the incorporation of the Allen Amendment into the House bill, it is significant that after quoting from a statement by Mr. Wells, Dairy Commissioner of Pennsylvania, as to materials used and methods of manufacturing renovated butter he stated, "With these facts before us, who can say that restrictive legislation is unnecessary" (Congressional Record, page 4586).

He further said (Congressional Record, page 4587), "It is anticipated that this legislation will prevent fraud, protect the public from an article of food of unknown or doubtful origin, and insure to the purchasers of butter the pure product of the churn and dairy."

With an unimportant amendment as to the definition of process or renovated butter the House concurred in the Senate Amendment April 3rd, 1902.

In the *Bohl case*, 125 Fed. 625, at p. 626, the Court said:

> *"Other provisions of the (Renovated Butter) Act in question may gain their efficacy from the taxing clause of the Constitution, but Section 5 goes to the commerce clause as the fountain whence its vigor springs."* (Italics supplied.)

The Section 5 referred to by the learned Judge is now codified as Section 2325 of the Internal Revenue Code, which makes it the duty of the Secretary of Agriculture to

determine the suitability of raw material used in the manufacture of renovated butter in the following language:

> "The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326(c) and 2327(b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."

The authorities cited and the language employed in the Statute negative the idea that the primary purpose of the Renovated Butter Act was to raise revenue.

The remarks of Senator Spooner quoted in the respondents' brief were merely to show that the rights of the State to control the finished product of oleomargarine, process butter, etc., after its interstate transit was complete was unshackled by the original package doctrine.

The history of the Act above referred to shows how fully and completely Congress intended to occupy the field of complete sanitary regulation and control of both the raw material and the finished product of other butter in interstate commerce.

On page 16 of respondents' brief it is said that:

> "Counsel's intimation that the State is excluded from the field because a tax is paid by petitioner is obviously unsound."

If any intimation of that kind was made we were not conscious of it, and have been unable to find it on subse-

quent examination of our brief. We regard this as a straw man learned counsel erected to be easily destroyed. We make no such claim and argument along that line, and the citation of authority serves no useful purpose in this case.

The legislative history of the Act of August 10, 1912, chapter 284, 37 Statute at Large 273, is also most significant and evidences the continuing purpose of Congress to give full authority to the Secretary of Agriculture to inspect the raw material prior to its being processed, in order to clear up a question which had been raised by the solicitor of the Department of Agriculture as to the authority of the Secretary in that respect.

This act was a part of the Agricultural Department appropriation Act of August 10, 1912, and is codified as Section 997 (b), (c) Title 26, United States Code Annotated. Section 2327 (b) (c) I. R. C. The text of the act being: "That the sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in Act of June 30, 1906, (34 Statutes, page 676) are hereby extended to cover renovated butter factories as defined in the Act of May 9, 1902, under such regulations as the Secretary of Agriculture may prescribe."

This provision was contained in House Bill 18960 as reported by the Committee on Agriculture. In reporting the same the committee made this statement: "It has been found that the department has not sufficiently definite authority to make the desired sanitary inspection in the factories indicated and this language is inserted to give that authority."

When this provision was read to the House sitting as a whole, when a point of order was made by Mr. Mann, Mr. Lamb and Mr. Lever, who had charge of the bill, then made statements to the effect that the committee had gone into the matter carefully, and that there were some fifty renovated butter factories in the United States and while

the department was authorized to inspect their products it had no authority to destroy the butter that was made up into the finished product nor to compel sanitary conditions in factories.

In the statement of the House Conferees as to the concurrence in Senate Amendment it was said:

> "Amendment 46, to which the House agrees, restores to the bill language stricken out upon a point of order on the floor of the House extending to renovated butter factories certain sanitary provisions of the Meat Inspection Act."

The legislative history above referred to shows that the purpose of the amendment was to clarify the law and remove any doubt as to the authority of the Secretary of Agriculture to seize the raw material if it was unfit for conversion into a wholesome finished product. The amendment was advocated by the solicitor of the Department of Agriculture and experts from that department supported it by testimony. The amendment was thrown out on a point of order in the House and restored to the bill in the Senate and it was adopted by a conference committee and approved by the House and Senate.

2.

> "The claim that Congress has specifically indicated its will that raw butter in interstate commerce for manufacture into renovated butter for sale and shipment in interstate commerce may be confiscated by the States."

The contention of the respondents that the petitioner's plant is not a conduit through which the raw butter in interstate commerce flows into the channels of trade in interstate commerce in the form of a finished product, and the quotation from *Bacon* v. *Illinois*, 227 U. S. 504, ignores the record and the stipulation in the record. The respond-

ents fail to point out how the raw material would ever reach the current of interstate commerce in the form of a finished product except through petitioner's plant.

> "Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular piece of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce."
>
> *United States* v. *F. W. Darby Lumber Co.*, 61 Sup. Ct. Rep. 451-459.

The contention made by the respondents that the raw material loses its interstate character because it temporarily comes to rest in the petitioner's plant while being converted into the finished product, for sale and shipment in interstate commerce, was urged and repudiated in *Labor Board* v. *Jones and Laughlin*, 301 U. S. p. 1.

The legislative history of the Renovated Butter Act and the pleadinge in this case show that the petitioner's renovated butter plant is an instrumentality of interstate commerce in much the same way as the actual carriers of interstate commerce. It is a focal point through which the stream of commerce in raw butter sweeps on its way from the producer to the consumer.

Plumley v. *Mass.*, 155 U. S. 461, is relied on by the respondents as an authority to support the claim that Congress has specifically indicated its will that raw butter in interstate commerce for manufacture into renovated butter for sale and shipment in interstate commerce may be con-

fiscated by the State. The case, in our judgment, does not remotely support any such contention.

The validity of a State Statute was the primary question before the Court, and an intrastate sale only at retail of a finished product, was involved. No Federal Statute requiring the Secretary of Agriculture of the United States to make an inspection of the raw material and determine its suitability for conversion into the finished product was in existence at that time. Oleomargarine, not renovated butter, was involved. The oleomargarine was artificially colored so as to cause it to look like butter. The basis of the decision was that the State had a right to protect its citizens against fraud perpertrated by artificially coloring an article that was offered for sale at retail within the State. The interstate character of the article was not involved. In such circumstances, this Court could hardly do less than say of legislation of that kind that it was clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits.

In *In re Rahrer*, Congress spoke, by the Wilson Act, and declared that imported liquors or liquids should, upon arrival in a State, fall within the category of domestic articles of a similar nature. The only question before the Court was whether the law was open to constitutional objection. The Court decided it was not.

And although the Court held the statute has a valid enactment, it decided in *Rhodes* v. *Iowa*, 170 U. S. 412, that the statute notwithstanding, the articles moving in interstate commerce could not be interfered with before its transit was complete.

Neither the *Plumley* nor the *Rahrer* case, nor any other case that we have been able to find, intimates or suggests that Congress has ever indicated that it is willing for any state official to stop a truck concededly moving in inter-

state commerce loaded with raw material for conversion into a finished product for sale and shipment in interstate commerce (R. 15) and to seize such material before its transit is completed. If the officers possess the power to stop a truck thus moving, what is to prevent them from stopping every railroad train carrying the same or any other commodity moving in interstate commerce?

On page 24 of respondents' brief an abbreviated and imperfect reference is made to the caption of the Renovated Butter Act of 1902. Apparently the learned counsel for the respondents, like the Court of Appeals in its majority opinion, selected only a portion of the title and ignored one of its most important provisions, to-wit, the provision in the title asserting that the Act was an Act to Regulate the Manufacture of Certain Dairy Products, including Renovated Butter. The complete title as we find it in 3 Fed. Stat. Ann. vol. 3, page 127, is as follows:

> "An Act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, *and regulate the manufacture and sale of certain dairy products*, and to amend an Act entitled 'An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine,' approved August second, eighteen hundred and eighty-six." (Italics ours.)

The respondents say that because Congress declared that the finished product shall, upon arrival in a State, fall within the category of domestic articles of similar nature that the Court cannot imply that Congress intended by such an enactment to exclude the State from the regulation of the raw material moving in interstate commerce used in the manufacture of the finished product for sale and

shipment in interstate commerce. The language of the statute renders any such implication unnecessary.

Congress has made it the duty of the Secretary of Agriculture to make a rigid sanitary inspection of the raw material in interstate commerce and to determine its suitability for conversion into the finished product, and to seize and condemn any raw material that contains anything unwholesome or deleterious to health in the finished product. We are not dependent upon any implication. Our rights are based upon the express language of the statute, and there is no suggestion in the enactment that any field of inspection or regulation of the raw material was left open to the State. The only field left open to the State by the enactment was the field reserved to the State by the language employed which made the finished product subject to the laws of the State when offered for sale in the State, which as the Congressional debates show, was an effort on the part of Congress to get rid of the original package doctrine in so far as the finished product is concerned.

3.

The claim that the Renovated Butter Act does not operate to render inoperative the State's right of action in cases of this kind.

We agree with our able attorney general that there is a vast disparity of fact and logic in the two lines of cases which he refers to as the "Railroad Cases" and the line of cases headed by *Mintz* v. *Baldwin*, 289 U. S. 346, but we do not agree that his analysis of the difference between the cases is even approximately correct. The fundamental basis of the "Railroad Cases" is not whether the conduct involved operated as an actual barrier and a serious impediment to interstate commerce; the fundamental basis

of the "Railroad Cases" is that Congress had completely occupied the field and there was therefore no part of the field in which the State could operate with respect to the subject matter of the legislation.

The difference between the "Railroad Cases" and the *Mintz* v. *Baldwin* case is striking. In *Mintz* v. *Baldwin* the Government had issued no quarantine or regulation pertaining to Bangs disease and a governmental department official advised the State that it was the policy of the Government to leave the control of Bangs disease with the various States (page 349). Moreover, the legislation itself excluded State inspection only in cases where Federal inspection had been made and a certificate issued by the Federal inspector. That was a provision of the legislation under review. The cattle involved were not inspected by a Federal inspector and no certificate was issued under Federal authority.

The Federal Statute involved in *Mintz* v. *Baldwin* expressly provided that State inspection was excluded only in cases in which a certificate had been issued by the Federal inspector. No certificate having been issued by the Federal inspector, the cattle involved were not under the protection of the Federal law. It is strongly implied in *Mintz* v. *Baldwin* that had a certificate been issued the State could not have interfered.

The Renovated Butter Act does not require the issuance of a certificate. It requires the Secretary of Agriculture to inspect and determine for himself the suitability of the raw material for conversion into the finished product. But, it does not require him to evidence that fact by any formal certificate as was the case in the *Mintz* case, *supra*. In *Mintz* v. *Baldwin*, it was optional with the cattle owner whether he would have his cattle inspected by a Federal inspector and obtain the certificate authorized by law in such cases.

In the case at bar it is not optional with the petitioner as to whether the Secretary of Agriculture will inspect the raw material. The Secretary of Agriculture is required to perform that duty and to make the examination and finding required by statute, and to him is committed the sole responsibility for determining the suitability of the raw material for conversion into renovated butter for sale and shipment in interstate commerce. If it be claimed that any particular lot of raw material seized by the respondents was not actually inspected by the Secretary of Agriculture prior to its seizure, that fact is no evidence that the Secretary of Agriculture would not have inspected the raw material in due time.

The respondents say that the *Mintz* case is to be distinguished from the *Napier* case and like cases because it was stated in the *Mintz* case that:

> "The purpose of Congress to supersede or exclude State action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear."

We have been unable to find any authority intimating that the purpose of Congress to supersede or exclude State action against the ravages of disease must more definitely and clearly appear than the purpose of Congress to supersede or exclude State action against the seizure of a legitimate article of commerce moving in the stream of interstate commerce. It is not so much a question of the purpose of Congress. The makers of the Constitution of the United States had a purpose and that purpose was to exclude the State from the seizure of a legitimate article of commerce moving in the stream of interstate commerce.

The respondents say that the fundamental basis of *Oregon-Washington R. R. Company* v. *Washington*, 270 U. S. 287, is that the statute operated as an actual barrier

and as a serious impediment to interstate commerce. The same thing is true in this case. If the respondents have the authority to stop a truck loaded with raw butter moving in interstate commerce before it reaches petitioner's plant, or to seize raw material in petitioner's plant while being held there for the sole purpose of being converted into renovated butter for sale and shipment in interstate commerce, then the respondents seriously impede interstate commerce and in that way their action is an actual barrier to interstate commerce and imposes an intolerable burden on the same. But the attorney general's analysis of the *Oregon-Washington R. R. Co.* case is incomplete.

The *Oregon-Washington Company* case is based on the proposition that in Section 8 of the Federal legislation there involved it was made the duty of the Secretary of Agriculture to quarantine any State when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation new to or not theretofore widely prevalent or distributed within and throughout the United States, just as it is made the duty of the Secretary of Agriculture in this case to make a rigid sanitary inspection of the raw material and the finished product and to determine the suitability of the raw material for conversion into the finished product. In each case the Secretary of Agriculture is required by Federal legislation to perform a certain duty. The method of performing it is left to his discretion. The State officials in Washington attempted to do the identical thing the Federal legislation required the Secretary of Agriculture to do, and they attempted to justify their action on the theory that they were cooperating with him and that inasmuch as he had not acted in the particular case they were at liberty to proceed.

The court dismissed that specious plea with the comment that the act made no reference whatever to cooperation with State authorities. It proposes the independent exercise of Federal authority with reference to quarantine in interstate commerce. It covers the whole field insofar as the spread of plant disease by interstate transportation can be affected and restrained.

In the case at bar, the Renovated Butter Act makes no reference whatever to cooperation with State authorities. It proposes the independent exercise of Federal authority with reference to the sanitary inspection and regulation of both raw material and the finished product in interstate commerce. It covers the whole field insofar as the inspection of the raw material and the finished product and its manufacture is concerned. With such authority vested in the Secretary of Agriculture and with such duty imposed upon him, the State laws that affect interstate commerce, if there are any such laws, and this Federal law cannot stand together. We respectfully submit that it is impossible to distinguish from the case at bar from the *Oregon-Washington* case.

On page 34 of respondents' brief the bold statement is made that:

> "Congress has indicated no intention to regulate the packing stock butter, as such. No authority is granted to the agents of the Federal Government to seize this packing stock butter if it is found to contain matters that might spread disease and pestilence."

Counsel apparently overlooked Section 2325 of the Internal Revenue Code requiring the Secretary of Agriculture to cause a rigid sanitary inspection to be made of the materials going into the manufacture of raw butter and empowering him to make all needful regulations for carrying out the Renovated Butter Act and investing in him the

power to ascertain whether or not materials used in the manufacture of renovated butter are deleterious to health or unwholesome in the finished product, and expressly providing that in case such deleterious or unwholesome materials are found to be used in the butter *intended* for exportation or shipment to other States he shall have power to confiscate the same.

The counsel also apparently overlooked the broad scope of the Meat Inspection Act which is now applicable to the Renovated Butter Industry. Raw material does not have to reach the stage where it might spread disease and pestilence before it is subject to the condemnation of the Secretary of Agriculture. If the raw material reaches the stage where it is deleterious to health and unwholesome in the finished product it is subject to seizure and liable.

Respondents say that our claim that the real danger to the public is in the finished product is the conclusion of counsel. Our reply is that it is not the conclusion of counsel, it is the conclusion of Congress and the conclusion of the Federal Courts based on an obvious truth.

State v. *Cecil*, 216 Ala. 391.

In the brief of the respondents the attorney general says that the Alabama Agricultural Code is not intended to regulate interstate commerce and that if it effects it at all it does so incidentally and within a permitted field, p. 38, 39.

We agree that the Alabama Agricultural Code was not intended to regulate Interstate Commerce. In the *Cecil* case, 216 Ala. 391, the Alabama Supreme Court said that the language employed in Article 23 of the Agricultural Code of 1923, now Article 25 of the Agricultural Code of 1927,

> *"as in other parts of the Agricultural Code was, as we think, intended to confine its operation to intrastate*

commerce and so avoid conflict with the Federal Constitution."

We do not agree with the attorney general's assertion that if the Act affects interstate commerce it does so incidentally and within a permitted field. As construed by the respondent it places an intolerable burden on interstate commerce and erects an actual barrier to it after unwarranted invasion of a field occupied by Congress.

This Court is not concerned with any incidental interference with interstate commerce in this case. The interference is direct, immediate, serious and far reaching. *If it be true, as the attorney general states, that the Agricultural Code is not intended to regulate interstate commerce how can it be argued that it confers any authority on the respondents to interfere with that commerce in the way it is conceded the respondents have done and threaten to continue to do as shown by the record.*

Conclusion.

The argument of the Attorney General demonstrates that the nature and character of the questions involved in this case make it a case in which it is particularly fitting that a writ of certiorari issue to the end that this Court may finally determine and settle those questions that are of vital importance to the renovated butter industry, to the small producer of raw butter, to the great army of consumers and also to those engaged in the tremendous industry known as meat packing business.

Respectfully submitted,

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH.

Certificate of Counsel.

I hereby certify that I have this day forwarded a copy of the foregoing brief and argument to Hon. T. S. Lawson, Attorney General of Alabama, and Hon. William H. Loeb, Assistant Attorney General of Alabama, by registered mail, post paid to their P. O. address in the Department of Justice Building in the City of Montgomery in the State of Alabama.

This the 2nd day of April, 1941.

HORACE C. WILKINSON.

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